IN THE SUPREME COURT Of the United States

OCTOBER TERM, 1941
No. 2

MARTIN J. BERNARDS and LENA BERNARDS, his wife,
Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE UNITED STATES NATIONAL BANK OF PORTLAND (OREGON), and JOSEPH M. LOOMIS, Trustee,
Respondents.

Upon Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

ANSWER OF RESPONDENTS M. R. JOHNSON AND CATHERINE COLLINS TO SUMMARY BRIEF FOR PETITIONERS ON REARGUMENT

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LANE-MILES STANDISH CO.

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FACTS

There are numerous statements in the various brief on behalf of petitioners which are not supported by the record. We believe these should be corrected even though some of them are not material to the legal issues here involved.

At the bottom of page 4 of petitioners' original brief, there appears a statement, not in the record, with regard to the purported acts of the sheriff in seizing and selling household goods of the petitioners. This statement may be literally true for all we know, but the inference that respondents had something to do with it or to gain by it, which petitioners must have hoped the court would draw, is emphatically not true.

The statements beginning at the bottom of page 5 and running over through the third paragraph on page 7 of petitioners' principal brief are all unsupported by the record.

On page 2 of their reply brief, petitioners take issue with certain statements of fact made by respondents. Those statements were fully supported by the findings of the Conciliation Commissioner and the court and were in all things correct. So far as petitioners have cited the record at all to rebut them, they have cited the self-serving statements of petitioners themselves.

In petitioners' summary brief on rehearing on page 10, it is stated that no evidence was ever given before the Conciliation Commissioner other than in connection with the question whether or not the appellants were farmers. This is unsupported by the record and is not true. On the same page, near the bottom, the trial judge is alleged to have made certain remarks, and reference

is made, in support of this, to a paper filed by the petitioners in the Circuit Court of Appeals. No such remarks were ever made by the trial judge.

The findings of fact were filed May 10, 1938, the trial having been had April 13, 1938, on the petition of the bankrupts and the answers of the respondents herein, and the bankrupts' reply to said answers.

The petitioners' briefs state that no oral testimony was presented at the trial on which the findings of fact were based. The statement is true, but misleading. At the time of the trial, the petitioners presented no testimony in support of their petition, and to avoid presenting a large amount of documentary evidence, their attorney agreed to the allegations made in certain parts of the respondents' answers. (R. 64.)

All of the findings of fact were based either on the stipulation above mentioned, or on the record itself.

The numbers of the findings of fact with their sources appear in the following table:

I. R. 9, 13, 14
II. R. 17, 19, 135-138, 53
III. R. 48
IV. R. 54, 55, 24
V. R. 31, 32
VI. R. 58 and stipulation
VII. Stipulation
VIII. Stipulation
IX. Stipulation
X. R. 20
XI. R. 50 Con. Commissioner's Findings XXIII, XXIV, XXV
XII. R. 53, Con. Commissioner's Finding XXXV

XIII. Invalid under Bartels case
XIV. Invalid under Bartels case
XV. Stipulation
XVI. Stipulation
XVII. Stipulation
XVIII. Stipulation
XIX. Stipulation
XX. Stipulation
XXI. Stipulation
XXII. Stipulation

ARGUMENT

Findings of Fact

It will be seen that the findings of fact are completely justified by the transcript of record, were admitted in several essential parts by the petitioners, fully support the decree and if manifest error is not found will not be disturbed by this Court.

Neece v. Durst, 61 Fed. (2d) 591

Exchange Nat. Bank v. Meikle, 61 Fed. (2d) 176, 179

Cross v. Furn. Co., 63 Fed. (2d) 421

The findings do not speak directly of the bankruptcy proceedings in the period beginning with December 19, 1934, when the petitioners filed their amended petition and ending with August 28, 1935, when new (s) became effective. They show, however, that such proceedings and the lack of any proper proceedings by the petitioners

were in the minds of the conciliation commissioner and the court when the findings and orders of the commissioner and the orders of the court were made. See Findings II and III.

The findings also show the regularity of the election and actions of the trustee; Findings IV, V, VI, VII, VIII and IX. Also, non-compliance with conditions to obtain three years stay; and failure to submit a feasible plan for liquidation of secured claims in the composition-extension proceedings; Findings XI and XII.

The Automatic Stay and the Foreclosure Sales

It will be recalled that petitioners were adjudicated bankrupts in December, 1934, and that the sheriff's sales took place after the Radford decision and before the amended section 75 (s) became law. Unquestionably these sales were valid unless the automatic stay provided for by section 75 (o) was still in effect, for as we have pointed out in our original briefs there was nothing else that could have prevented or invalidated the sales. The general bankruptcy act was no obstacle. The stay provisions in the former section 75 (s) had been invalidated by the Radford decision.

The Radford decision left section 75 (a) to (r) exactly as it was before the first section 75 (s) was passed. It provided solely a scheme for composition or extension of a farmer's debts, and subsection (o) (the stay provision) was intended to maintain the status quo until the farmer could propose a composition or extension and the proposal could be acted on by the creditors and the court. The stay was not intended to outlive the actual proceedings leading up to a composition or extension and this is made plain by its own words providing that proceedings against the debtor should not be maintained "prior to the confirmation *or other disposition* of the composition or extension proposal by the court." Furthermore, the proceedings were intended to be prosecuted with reasonable dispatch, and this Court, to assure that, had adopted General Order in Bankruptcy No. 50 providing that the court should dismiss proceedings not later than three months after the first meeting of creditors.

It is our position that the adjudication of bankruptcy was not only an abandonment of the composition or extension proceedings by the debtors but a *disposition* of them by the court. Petitioners have endeavored to meet this by arguing that the adjudication of bankruptcy was a nullity because old section 75 (s) was unconstitutional and have attempted to buttress this by saying that a farmer could not be adjudged an involuntary

bankrupt. But petitioners were not adjudged involuntary bankrupts. They were adjudged bankrupts on their own petition. Their adjudication was voluntary and there was a law authorizing them to become voluntary bankrupts. It is fallacious to say the adjudication was a nullity because they also asked for other relief under a void law.

Our position is supported by the recent cases of *Layton vs. Thayne*, 116 Fed. (2d) 796 and *Buttars vs. Utah Mortgage Loan Corporation*, 116 Fed. (2d) 622. There are other cases but we have chosen these because they were decided this year and in the light of all of the decisions handed down by this Court.

There being no stay in effect, the foreclosure sales were not prevented, and under the law of Oregon they transferred to the purchasers all rights in the land that the petitioners had, subject only to the statutory right of redemption, which, as explained in our original briefs, was nothing more than a right to repurchase. The purchasers were entitled to possession immediately upon sale.

We believe it was the late Mr. Justice Holmes who remarked that a title to property was a bundle of rights. The bundle that the foreclosure purchasers had after the sales included the right to the possession and enjoyment of the property, and the bundle that petitioners retain

contained only an option to reacquire that right by paying a sum of money.

As this Court has repeatedly held (*Wright vs. Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490 and *Union Joint Stock Land Bank vs. Byerly*, 310 U. S. 1, 84 L. Ed. 1041) the subsequent act of Congress, while it could affect the further remedial rights of the respondents, could not take from them the property rights that they already had and transfer them to petitioners.

The Amended Act and the Right of Redemption

The new act, as this Court held in the Byerly case, was not automatic. It did nothing by its mere enactment. It was necessary, if petitioners were to secure any benefits by it, for them to take the statutory steps to set it in motion. Had they done so promptly, perhaps the running of the redemption period would have been interrupted for a three year stay period, although the right of possession and enjoyment could not have been restored to them. They would have been entitled to possession and control of *their property* but that right was no longer *their property*.

However, it is the position of these respondents that petitioners did not properly invoke the act. The act says

that they must be adjudicated bankrupts, that they must petition the court that their property be appraised and their exemptions set aside to them and that they be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of their property and that, *upon such a request being made*, the referee shall designate appraisers and that after the appraisement and the setting aside of exemptions a rental stay order shall be made.

Now all that petitioners actually did after the passage of this act and until after the right of redemption had expired was to petition the court that the reference of their case to a regular referee in bankruptcy be cancelled and that it be referred to a conciliation commissioner. They say in their summary brief that this was a *reinstatement* of their case.

As a matter of fact, their case did not call for reinstatement. It was already pending, and the new act provided for reinstating only cases that had been dismissed. The order on petitioners' request for rereference accomplished just what they asked for, namely *a rereference, and nothing more*. If they wanted such of the benefits of the new act as it may have been still possible for them to get after the foreclosure sales, it was necessary for them to comply with its provisions and make the request to the court that the act provided for. They

failed to do that until after the redemption period had expired.

If their own argument is to be accepted, they failed even to take the preliminary step of asking to be adjudicated bankrupts, because they say their adjudication in December, 1934 was void. Petitioners now argue, however, that the passage of the new act automatically breathed life into the bankruptcy adjudication that they say had been void, and they claim that their request for the benefits of the old act, filed in February, 1935, became, without any action on their part except their request for a rereference, a new application for the benefits of the new act.

The old act called for appraisal at "not necessarily the market value." The new act called for appraisal at the market value. The old act called for a five year stay under certain conditions. The new one called for a three year stay under different conditions. The new act says that the bankrupt, if he wants its benefits, *shall request* the appraisal, stay, etc. It does not say that a request made for something else, at a time when the new act was not even contemplated, may stand in place of what it says shall be done. Perhaps Congress could have provided that the taking of vain steps under the old act should excuse the necessity of taking more or less corresponding steps under the new one but certainly it

did not so provide, and if it had it would be hard to know where such a procedure began and left off. Suppose, for example, that an appraisal had actually been made under the old act. Could that take the place of an appraisal under the new one? Obviously not. Suppose a rental stay order had been made under the old act. Obviously it could not stand as a rental stay order under the new one and since, as this Court has held, the new act did not impose itself automatically on a farmer who had been under the old one, whether he wanted it or not, but only if he took steps to set it in motion, what steps would he have to take? The conclusion is irresistible that the steps he would have to take would be the ones set forth in the statute and that he would actually have to take them. It would not be enough that before the act was passed he had made a different request to the court.

Since petitioners did not set the new act in motion, we submit that the redemption period was not interrupted and that, at its close, no stay existed or was created to prevent the sheriff from issuing his deeds, and that the deeds were valid. Nothing that petitioners did or could do after the issuance of the deeds could affect the title of respondents to the land.

Old Cases Under The Act

As to farmers' bankruptcy cases commenced before the Act of August 28, 1935, it is provided in (s) (5) of that act that there are three classes of cases in which the farmers could come under the act:

1. Cases then pending in any Federal Court.
2. Cases dismissed because of the Radford case.
3. Cases where any farmer debtor had filed under the General Bankruptcy Act provided he makes written request to the court to take advantage of the act.

Class 2 may be disregarded since this case was not dismissed because of the Radford case.

The petitioners claim this is a case then pending in the Federal Court under the provisions of (a) to (r) and deny that they have ever been under the General Bankruptcy Act.

Our position is that if petitioners either had a case pending or were general bankrupts, they never took the proceedings necessary to qualify them for the benefits of the act.

Case Pending

If the petitioners had not already forfeited their rights under (a) to (r) they were qualified on August 28, 1935, to begin proceedings under (s). But they had lost

their rights under (a) to (r) much earlier. Regardless of their duty to proceed with diligence, and after December 15, 1934, when the conciliation commissioner reported the failure of their second proposal to creditors and that his duties had been completed (R8), they did nothing, except for a vain attempt at a third proposal when on June 28, 1935, they asked the court for a reference to the conciliation commissioner. The order of the court on this reads in part (R. 145):

> "And it further appearing that the secured creditor has already been delayed approximately one year by proceedings under these acts,
>
> "It is Ordered that said petition be and the same is hereby denied."

The above order in effect says that at some prior date the petitioners had exhausted their rights under (a) to (r) and this last application was for purposes of delay.

Taking December 15, 1934, when the second proposal to creditors failed, as a beginning date, a reasonable length of time within which the debtors must act was three months. An indication that this is a reasonable time under such circumstances is in Rule 50 (4) of the "General Orders in Bankruptcy," which provides for a dismissal of proceedings:

> "If the farmer has not applied for confirmation within such reasonable time as has been fixed therefor, which shall be not later than three months after the date of the first meeting * * *."

The petitioners commenced their proceedings (a) to (r) on August 10, 1934, and were through with them in their own minds on December 15, 1934, as is shown by their amended petition of December 19, 1934. Meantime, the mortgagee-respondents were unable to move.

We claim, therefore, that the (a) to (r) proceedings were terminated by the laches of the petitioners three months after December 15, 1934.

The bearing of this on the renewal of the foreclosure is obvious.

On May 29, 1935, immediately after the Radford decision, respondents Johnson and the Bank renewed their foreclosure suit by issuance of execution, and on July 9, 1935, respondent Collins renewed her suit by entry of the foreclosure decree. (R. 72, 73.)

Showing the slow action of the petitioners, their willingness to delay proceedings and their consistent laches, see the outline of proceedings at the beginning of respondent Collins' first brief and notice how little was done by them properly and effectively between December 15, 1934, and September 10, 1936, by which latter date both foreclosure deeds had been executed.

Moreover, unless this became a general bankruptcy case, the petitioners had no way to obtain the benefits of sub-section (s) except to file a new amended petition.

The Petitioners in General Bankruptcy

In addition to the consideration of general bankruptcy in respondent Johnson's first brief, pages 31 to 33, we submit that if the amended petition, under the circumstances of this case, is held to be a petition in voluntary general bankruptcy, then the petition and adjudication and possibly the order of reference, etc., were parts of a general bankruptcy proceeding. As general bankrupts the petitioners could have taken advantage of the Frazier-Lemke Act by making a written request to the court (last sentence in Section 75 (s) (5).

The petitioners ask that their petitions of February 8, 1935 (R. 36) and September 30, 1935 (R. 16), be considered as the written request required by the statute.

The petition of February 8, 1935, was at a time when there was no statute providing for the appraisal request or for possession of the property which was specifically sought in the petition on the basis of sub-section (s).

The petition of September 30, 1935, and the order based thereon were for the special and limited purpose of obtaining a more conveniently located referee and contained no attempt to seek advantages under the new Frazier-Lemke Act. No written request appears until July 15, and August 8, 1936, when the petitioners petitioned the conciliation commissioner, who denied their

petition (R. 19, 22, 53) and no appeal was ever taken. It therefore never became a request to the court. Moreover, the deed on the Johnson foreclosure had been executed on July 1. While the redemption period under the Collins foreclosure did not expire until August 26, yet the Johnson sale had included the Collins property, on which the Johnson mortgage was a second lien, so it was Johnson, not Bernards, who was entitled to redeem the Collins tract from sale between July 1 and August 26. The next petitions which may be considered a request, were filed in January, 1937. (R. 25, 77.) This was months after the mortgagee-respondents had received their deeds on foreclosure.

Res Judicata

On this subject, we have little to add to what has been said in the previous brief of respondent Johnson. Suffice it to say that so far from the question of *res judicata* being raised for the first time in this court, it has been raised at every stage of the proceedings. For example, when petitioners filed with the Conciliation Commissioner their petition of January 4, 1937, respondent Loomis moved to dismiss it on the ground that all matters involved in it had already been adjudicated, and that motion was granted. It was raised before the District Judge and again raised before the Circuit Court of Appeals, even

though that court based its decision, at least in part, on other grounds.

It is of course true that bankruptcy courts have no terms and it has been held, as petitioners say, that they *may* rehear their previous decisions at any time before the case is closed *unless* rights have become vested in reliance upon them which will be disturbed by their vacation. But it is equally well settled that an order of a bankruptcy court cannot be collaterally attacked and stands unless appealed from, even as to some other application in the same cause, and it is just as clear that a party whose right of appeal from an order has expired cannot circumvent the statutory limitation of time for appeal by asking for a rehearing and then appealing from its denial. See the cases cited in the former brief of respondent Johnson and also *Chapman vs. Federal Land Bank*, 117 Fed. (2d) 321 (6th Cir.) and *Buttars vs. Utah Mortgage Loan Corporation*, 116 Fed. (2d) 622 (10th Cir.).

Moreover, rights had become vested in reliance on orders of the bankruptcy court. Not only was there never any attempt on petitioners' part to have the adjudication of bankruptcy set aside but later, after the Radford decision and before the sheriff's sales, the court made an order declining to re-refer the case to a conciliation commissioner so petitioners could make a third composition offer, and this refusal was based on the

express ground that petitioners were in bankruptcy (R. 145). (Incidentally this was the first adverse ruling with which petitioners met.) Later, after the sales, the court on a show-cause order permitted the sheriff to dispossess petitioners under a writ of assistance (R. 48). These rulings were made by a court having jurisdiction of the parties and the subject-matter, and respondents' rights became vested in reliance on them. If they, or any of the subsequent rulings of which petitioners later complained were erroneous, petitioners should have appealed from them instead of acquiescing and later seeking to attack them collaterally. *Union Joint Stock Land Bank vs. Byerly*, 310 U. S. 1, 84 L. Ed. 1041; *Wharton vs. Farmers & Merchants Bank*, 119 Fed. (2d) 487 (8th Cir.).

Recall of Mandate

This subject was discussed fully in the previous brief of respondent Johnson, and the point was there made that no court of the United States has ever held that the jurisdiction of an appellate court over a case in which it has already rendered judgment extends beyond the term at which it was rendered and the issuance of the mandate, unless specifically retained by order. In that brief, two decisions of this Court, among others, were cited as authority, namely, *Schell vs. Dodge*, 107 U. S. 629, 27 L. Ed. 601 and *Fairmont Creamery Co. vs. Minne-*

sota, 275 U. S. 70, 72 L. Ed. 168. Petitioners, at page 5 of their reply brief, contended that in those cases the mandate was issued during the term when judgment was rendered. The date when mandate issued in these cases does not definitely appear in the reports but we have made a careful examination of the original records of this Court and it clearly appears therefrom that in both of them the mandate was not issued until after the term had closed, and in both of them this Court held that it could not recall the mandate because the term at which judgment was rendered had expired, even though the term in which the mandate issued had not expired. Incidentally, motion to recall the mandate was made and denied in all four of the cases tried together in *Schell vs. Dodge*—not in only one of them as stated by petitioners.

Petitioners say that *this Court* still had jurisdiction, because it had denied their first petition for certiorari on October 23, 1939, that being in the same term in which the application to the Circuit Court of Appeals now before the court was made and denied. Since the application was not made to this Court but to the Circuit Court of Appeals, the question would seem to be as to the jurisdiction of that court and not this Court. However, if petitioners' argument has anything to do with the case, then it would seem that, according to them, whenever this Court denies a petition for certiorari, the Cir-

cuit Court of Appeals should wait until the end of this Court's term before sending down its own mandate, because during the term this Court may reconsider. Then, when it does issue its mandate in the term following the term when certiorari was denied, the District Court should delay another term because, according to petitioners, the Circuit Court of Appeals may reconsider. In other words, if petitioners are right, the mere filing of a certiorari petition in the latter part of the term would prevent any decision of a Circuit Court of Appeals from becoming final for about two years' time. That has never been the law and certainly it never should be.

Conclusion

We submit that the decision of the Circuit Court of Appeals, and of the District Court, was right and should be affirmed because:

(1) The sheriff's sales, having taken place after the termination of the debtor proceedings under (a) to (r) and before the present sec. 75 (s) took effect, were valid and transferred to these respondents all interest in the land except a right of redemption amounting to a mere option to repurchase.

(2) Because of their laches and because they failed to take the steps required by the amended act petitioners

at no time prior to the issuance of the sheriff's deeds, or thereafter, became entitled to the benefits of the amended sec. 75 (s), and consequently the right of redemption was never extended and petitioners lost even that when the deeds were issued.

(3) The matters determined had been previously adjudicated by orders which were no longer appealable and based on which rights had vested.

(4) The judgment of the Circuit Court of Appeals, sought to be reopened, had become final.

Respectfully submitted,

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